

To: Marketplace Facilitator Work Group
From: Richard Cram, Multistate Tax Commission Staff
Date: October 24, 2018

Comments received with responses to Follow-up Survey Request re Issue #2 and proposed language (underlined) submitted by Jerry Johnson (TaxCloud)

Responses received are shown on a separate spreadsheet.

Issue #2: Are registration and return filing requirements in conflict or duplicative? If the marketplace facilitator is required to register, collect and remit the sales/use tax on facilitated sales, then is there a need for the marketplace seller to register or report those same sales?

Option 2

2. The marketplace facilitator is required to register, collect and remit sales/use tax on behalf of all of its marketplace sellers, unless a marketplace seller has opted to register, collect and remit sales/use tax on its sales made through that marketplace facilitator and has provided to the marketplace facilitator a copy of its registration with the state.

Proposed language (underlined) for Option 2:

(a) A marketplace provider shall collect sales and use taxes and remit them to the commissioner under [applicable statute] for all facilitated sales for a retailer, and is subject to audit on the retail sales it facilitates unless either:

(1) the retailer provides a copy of the retailer's registration to collect sales and use tax in this state to the marketplace provider before the marketplace provider facilitates a sale; or (2) upon inquiry by the marketplace provider or its agent, the commissioner discloses that the retailer is registered to collect sales and use taxes in this state.

(b) Nothing in this subdivision shall be construed to interfere with the ability of a marketplace provider and a retailer to enter into an agreement regarding fulfillment of the requirements of this chapter.

(c) If a marketplace provider is the responsible party for collecting and remitting the sales and use tax under paragraph (a) of this subdivision, the marketplace provider shall provide to the retailer such information as is necessary for the retailer to identify

the transactions on which the marketplace provider is reporting to enable the retailer to accurately and timely meet it's obligations for reporting and remitting for non facilitated sales.

(d) If a retailer is the responsible party for collecting and remitting the sales and use tax under paragraph (a) of this subdivision, the marketplace provider shall provide to the retailer such information as is necessary on facilitated sales to enable the retailer to verify the correct amount of tax was collected for each applicable taxing jurisdiction and to accurately and timely meet it's obligations for reporting and remitting sales and use taxes.

Please indicate whether you would support the proposed underlined language:

☐ **yes**

☐ **no**

Alabama comment:

The Department's preferred approach is that collection and remittance by the MPF on behalf of the marketplace seller is not optional.

Colorado comment:

The information sharing arrangements between these two private parties seems like something the parties themselves should provide for and manage via their contractual relationship. The seller is in a better position than the state to know whether the facilitator is providing the information needed to meet its reporting obligations. Furthermore, it is the seller that is directly harmed by any failure of the facilitator in this respect—although the state may be harmed indirectly. If this language is retained, the rule should also spell out the consequences for facilitators who fail or refuse to provide adequate information.

Kentucky comment:

The group overwhelmingly supported Option 3, instead of Option 2, in the September 28 survey responses. Kentucky believes that this should not be included as an option in the white paper.

Minnesota comment:

Paragraph (b) above, which allows marketplace providers and marketplace seller to enter into agreement to fulfill their respective sales and use tax obligations, would allow marketplace providers and marketplace sellers to agree to provide the type of information contemplated in paragraphs (c) and (d) to one another. Thus, paragraphs (c) and (d) are unnecessary and make the law more complex when simplicity should be sought.

See Amazon comment below

Anonymous comment:

We do not endorse Option 2. Additionally, with regard to the recommended changes reflected in the underline of the doc, following are our comments:

Option 2(1)(c) is unnecessary. If facilitator is responsible for collecting and remitting, seller doesn't need any information to meet is own obligations for collecting and remitting "non-facilitated" sales. Unless the changes assume the seller has ALL the sales information and must deduct from their facilitated sales, but we do not think any seller operates that way so we think the proposed language is unnecessary. Also 2(1)(d) doesn't make sense. First it says if the seller is responsible for collecting and remitting, then goes on to say the seller needs info to verify the correct amount was COLLECTED BY THE FACILITATOR. It would make sense if it said seller reports and remits and not collected. Wouldn't the facilitator always collect? Otherwise, the facilitator would just be a referrer.

Mazeroov Comment:

I am not responding to this question because I oppose Option 2 in its entirety. There is good reason to be concerned about proper compliance from non-US marketplace sellers and marketplaces therefore must have the collection responsibility.

NetChoice comment:

NetChoice notes that most sellers list items on multiple marketplaces, in addition to making sales on their own website, over the phone, at their own stores, at craft fairs, etc. Tax collection by a marketplace facilitator does not relieve these multi-channel sellers of having to administer, collect, and file in up to 46 states (and possibly hundreds of local tax authorities in states like Louisiana and Colorado).

This makes it clear that states should not include marketplace sales when

determining if a small seller has reached the small business threshold. Sales where the platform handles sales tax should not count towards the small seller threshold for the seller's own sales, where they have to handle all tax administration burdens.

Walmart comment:

In lieu of answering Option 2, we have provided the RILA language that we are in favor of regarding collecting and remitting tax to the state. RILA Marketplace Model bill language states "A marketplace facilitator [doing business in the state under Section 1] is required to [collect and remit/pay] the [sales or use tax] on all taxable sales to customers in this state. However, a marketplace facilitator is not required to [collect and remit/pay] sales or use tax on a sale from a marketplace seller to a customer in this state if the marketplace facilitator elects to request and maintain a copy of the seller's registration to collect sales and use tax in this state. Nothing in this Section shall be construed to interfere with the ability of a marketplace facilitator and a marketplace seller to enter into agreements with each other regarding fulfillment of the requirements of this [Chapter]."

We do not mind providing the transaction level detail reports but the marketplace facilitator should be the entity electing to accept the marketplace seller's registration certificates.

Option 3

3. The marketplace facilitator is required to register, collect and remit sales/use tax on behalf of all of its marketplace sellers, without exception.

Proposed language (underlined) for Option 3

(A) A marketplace provider shall collect state and local sales and use tax on all sales made through the marketplace to purchasers in this state whether or not the marketplace seller:

- (1) has or is required to have a sales and use tax permit, or
- (2) would have been required to collect and remit state and local sales and use tax had the sale not been made through the marketplace provider.

(B) The marketplace provider shall provide to the marketplace seller such information as necessary for the retailer to identify the transactions on which the marketplace provider is reporting to enable the retailer to accurately and timely meet its obligations for reporting and remitting for non facilitated sales.

Please indicate whether you would support the proposed underlined language:

 yes

 no

Colorado comment:

Our comments on this question are similar to the above.

Minnesota comment:

To the extent marketplace providers provide this information to their marketplace sellers for accounting and income tax purposes, the language in paragraph (B) creates unnecessary complexity.

Texas comment:

We in Texas do not support either option in the survey. For Option 3, we would add the following comment:

The proposed language is unclear as to what type of information the marketplace provider shall provide to the marketplace seller. It is better to require the marketplace provider to provide a collection certificate to each marketplace seller to certify that the marketplace provider will collect and remit sales and use tax on a marketplace seller's sales through the marketplace. If a marketplace seller accepts the marketplace provider's collection certificate in good faith, the marketplace seller must exclude marketplace sales from its sales and use tax report. A marketplace seller should still be required to retain records for marketplace sales according to the state's recordkeeping requirements.

In addition, a marketplace seller should give the marketplace provider enough information to allow the marketplace provider to collect and remit sales and use tax correctly, including certifying that the item being sold is taxable, nontaxable, or exempt from taxation.

Amazon Comments:

Robert Plattner (10/22/18 email response to 10/18/18 survey request):

As you know, the states voted strongly in favor of having the marketplace facilitator be the sole tax collector with respect to all marketplace sales. My understanding is this policy will be recommended as a best practice to the Uniformity Committee.

While I do not think it is the intent of the current survey to reopen that issue, the first of the two survey questions ties Jerry's language regarding reporting of certain information by marketplace facilitators to sellers(the underlined language) to language that would allow third-party sellers to collect the tax. It then asks whether the state would support the proposed underlined language.

I think it is hard to answer yes to that question without the implication that the yes answer indicates approval of the non-underlined language(allowing third-party sellers to collect)as well.

As stated above, we believe the states have spoken out clearly against anything other than exclusive collection by the facilitators on this issue, and we do not want any confusion on this point.

That being said, Amazon strongly recommends the state reject the proposed language in both survey questions.

In order for a third-party seller to fulfill its own tax collection responsibilities, it needs only to know which sales it made on its own website. Surely, a third-party seller can determine this without imposing unnecessary additional reporting burdens on marketplaces. More than that, a third-party seller can easily determine from its own books and records on which platforms it made all of its sales. Such information is routinely shared among the parties as sales are made in order to determine how the funds flow.

It would be a waste of money, time and effort for small sellers to engage in an exercise to "square up" their sales tax liabilities across different channels every tax filing.

That would needlessly restore burdens on third-party sellers that are being shifted to Amazon and other marketplace facilitators under the new marketplace statutes.

Melissa Smith (10/23/18 email):

I couldn't agree more. By enacting marketplace laws, states are making the marketplace the responsible taxpaying entity. Along those lines, the marketplace shouldn't be required to provide information on those sales to the marketplace seller. It is incredibly and unnecessarily burdensome on both the marketplaces and the marketplace sellers and is inconsistent with the goal of the legislation.

Anonymous comment:

Option 3. With regard to the recommended changes reflected in the underline of the doc, following is our comment:

The seller does not need information from the facilitator in order for the seller to report and remit non-facilitated sales. The information for these first-party sales made by the seller

outside of the marketplace is already available to the seller. The only reason the seller might need info from the marketplace is if the seller's threshold for registering and collecting includes both the sales made on the marketplace and the seller's first-part sales (sales made outside of the marketplace) and for gross receipts tax purposes.

Etsy Comment:

My name is Michael Mincieli, and I am a Tax Director here Etsy. We wanted to weigh in on the amendment options circulated after last week's discussion, and support the amendments in both options. However, we strongly favor option 3 (with the amendment) over option 2, since as a marketplace facilitator currently calculating, collecting, and remitting state sales tax on behalf of purchases made in four states, we believe the amendment will help multichannel sellers in their accounting mechanisms.

The majority of Etsy sellers sell or promote their goods in other venues, including their own websites, craft fairs, and other marketplace platforms. Yet, they are still microbusinesses—87% of whom are women, and 97% of whom work from home. We believe the sales made on marketplace platforms should not count towards the various small seller exemption thresholds for economic nexus in the states. When marketplaces like Etsy comply with the marketplace provider laws, we are handling the administrative burdens that accompany the rules. Therefore, the the transactions made through marketplaces should not count towards the total small seller exemption thresholds for economic nexus purposes. This amendment would allow a seller to show that the tax on purchases made through the marketplaces has been accounted for, and provide a clearer picture of their multichannel business.

Mazeroov Comment:

My “yes” response is tentative. I would have liked to have more input from a) marketplace facilitators regarding how burdensome they believe such information provision would be; b) marketplace sellers and CSPs regarding how difficult compliance has been thus far for marketplace sellers in states imposing collection on marketplace facilitators because the latter are not currently required to provide this type of information to marketplace sellers; and c) from state sales tax auditors regarding the extent to which this information would be useful/necessary in auditing marketplace sellers with regard to their direct sales.

NetChoice comment:

NetChoice notes that legal challenges are likely against states that impose sales tax liability on marketplace facilitators who are not the seller-of-record. There are particular legal questions regarding laws imposing tax liability on a facilitator who does not process the purchase transaction.